

Before the  
**Federal Communications Commission**  
Washington, D.C. 205554

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

In the Matter of )  
)  
Implementation of Section 309(j) and )  
337 of the Communications Act of 1934 )  
As Amended )  
)  
Promotion of Spectrum Efficient ) WT Docket No. 99-87  
Technologies on Certain Part 90 )  
Frequencies )  
)  
Establishment of Public Service Radio )  
Pool in the Private Mobile Frequencies )  
Below 800 MHz )  
  
To: The Commission

**COMMENTS OF APCO**

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COMMUNICATIONS OFFICIALS-  
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August 2, 1999

No. of Copies rec'd 019  
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The Association of Public-Safety Communications Officials-International, Inc. ("APCO") hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. FCC 99-52, released March 25, 1999.

APCO is the nation's oldest and largest public safety communications organization. Most of its 13,000 individual members are state or local government employees involved in the management, design, and operation of police, fire, emergency medical, local government, highway maintenance, forestry conservation, disaster relief, and other public safety communications systems. APCO is an FCC-certified frequency coordinator for public safety channels in the VHF, UHF, 700 MHz , and 800 MHz bands.

## **I. INTRODUCTION**

The NPRM addresses a wide-variety issues, most of which concern the Commission's spectrum auction authority as it relates to private land mobile radio services. In particular, the Commission is struggling with provisions in the Balanced Budget Act of 1997, which exempt "public safety radio services" from auction. The difficulty is that, for this limited purpose, Congress adopted a relatively broad definition of "public safety radio services" which goes beyond the much narrower definitions used by both Congress and the Commission in determining eligibility for licenses in public safety spectrum.

APCO represents the interests of state and local government public safety agencies, which are clearly exempt from auctions. Aside from those state and local government interests, APCO does not take a position herein as to what other entities or services are also exempt from auction as a result of the Balanced Budget Act. A much greater concern for APCO is that the Commission must recognize that being exempt from auction is not the same as being eligible for public safety spectrum. Congress recognized this distinction in Section 337, where it adopted a much narrower definition of public safety for purposes of eligibility in the new 700 MHz band.<sup>1</sup> Unfortunately, the statutory language in Section 309, and the Commission's discussion of the exemption issue, creates confusion on this matter because of the use of the term "public safety radio services" to describe the broad class of radio services that are exempt from auction. The final order in this proceeding, as well as the implementing rules, must avoid this confusion. Otherwise, "non-public safety" entities may attempt to use the lack of clarity in the rules to gain access to scarce public safety spectrum.

Therefore, APCO proposes that the Commission adopt the following terminology:

"Auction-exempt services" are those land mobile radio services exempt from auction pursuant to Section 309(j)(2)(A) of the Communications Act, as amended.

"Auction-exempt entity" is an entity exempt from auction pursuant to Section 309(j)(2)(A).

"Public safety radio service" is a radio service with eligibility limited to entities (generally state and local governments) that protect the safety of life and property (e.g., the current Part 90, Subpart B, Public Safety Pool; the 700 MHz Public Safety band; and the 800 MHz Public Safety Pool). All "public safety radio services" are "auction-exempt services." However, there will be some "auction-exempt services" that are not necessarily "public safety radio services." Similarly, an "auction-exempt entity" is not necessarily eligible for a license in a "public safety radio service."

"Public safety entity" or "public safety services provider" is an "auction-exempt entity" that is also eligible for licenses in a public safety radio service. With few exceptions, this would be limited to state and local government entities .

By adopting these explicit definitions, the Commission could avoid confusion over the meaning of "public safety radio services" and prevent future disputes regarding eligibility in spectrum properly reserved for state and local government entities engaged in the protection of the safety of life and property.

**I. STATE AND LOCAL GOVERNMENTS SHOULD NEVER BE REQUIRED TO RELY UPON AUCTIONS TO OBTAIN THE SPECTRUM THEY NEED TO PROTECT THE SAFETY OF LIFE AND PROPERTY.**

Among the few "easy" issues in the NPRM are the proposals in paragraphs 26-29 that all existing public safety bands be exempt from auction. APCO obviously agrees with those proposals, adoption of which is necessary to fulfill the express will of Congress and to

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<sup>1</sup> See NPRM at ¶27.

promote good public policy. The cost of radio spectrum should never stand in the way of the basic communications needs of public safety agencies.

A more difficult situation is posed in paragraph 30 of the NPRM, regarding frequency bands shared between public safety (however defined) and non-public safety users. APCO is concerned that an overly narrow exemption in this regard could prevent public safety agencies from obtaining spectrum for critical needs that cannot be accommodated within dedicated public safety bands. There will always be some communications technologies that have important public safety applications, but cannot operate in dedicated public safety bands because of frequency congestion, propagation characteristics, equipment availability, or bandwidth and channel requirements. Some examples include fixed microwave operations, live video transmissions, location monitoring systems, and other specialized services. If auctions were the only way to obtain spectrum in bands accommodating such services, public safety users would be effectively denied access to critical technologies. Thus, the Commission should either avoid use of auctions in spectrum in which there is likely to be public safety licensees or designate portions of such spectrum for exclusive, auction exempt public safety use.<sup>2</sup>

## **II. CARE MUST BE TAKE IN DEFINING THE PRIVATE INTERNAL RADIO SERVICES EXEMPTION FROM AUCTIONS.**

Paragraphs 31 to 38 of the NPRM contain a discussion of the extent to which “private internal systems” should be eligible for spectrum in “public safety radio services”

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<sup>2</sup> For example, in deciding to auction Public Coast Station Spectrum in the VHF band, the Commission set aside certain channels for public safety land mobile use. Third Report and Order and Memorandum Opinion and Order in PR Docket No. 92-257, FCC 98-151 (released July 9, 1998), at ¶31.

(using the FCC's terminology). This portion of the NPRM is a good example of the confusion and danger caused by the unfortunate use of the term "public safety radio services" to define services exempt from auction under Section 309(j)(2)(A). APCO will assume herein that the Commission's use of the term "public safety radio services" in this context is actually referring to what APCO has identified above as "auction-exempt services." To that extent, APCO has only a few comments, as it is less concerned with the scope of the auction exemption than with the issue of eligibility for licensing in true "public safety radio services" (using APCO's terminology).

For example, APCO takes no position on the proposals in paragraphs 34 and 35 regarding the auction exemption for "emergency road services." However, under no circumstances should any emergency road service providers (*e.g.*, AAA or its service station providers) become eligible for spectrum in "public safety radio services" (using APCO's definitions). While emergency road services provide an important support function (*e.g.*, removing vehicles from roadways), they are not charged by the public with the task of protecting the safety of life, health and property. Emergency road services (and similar non-public safety "auction exempt entities") may be exempt from auctions by statute, but must not become eligible for the same scarce radio frequencies relied upon by police, fire, EMS and other agencies. That could create a scenario whereby a service station attempting to communicate with one of its tow trucks interferes with critical radio communications between police officers responding to a crime in progress or other life-threatening emergency.

In paragraph 36, the Commission proposes that all state and local government entities be presumed eligible for "auction-exempt services" without further showing. APCO

strongly supports this proposal as it avoids the impossible task of delineating the extent to which various governmental activities are involved in the protection of life, health or property. All state/local government radio operations are involved with public safety, albeit to varying degrees. In any event, state and local governments should not be forced to pay the Federal government for the privilege of using a public resource (the airwaves) in performing core governmental functions.

The Commission inquires in paragraph 38 as to whether commercial providers should be permitted to obtain licenses in “auction-exempt spectrum” if the spectrum is used “to protect the safety of life, health or property and not made commercially available to the public.” To the extent that the Commission is referring to “auction-exempt spectrum” other than “public safety radio services,” APCO takes no position. However, APCO strongly opposes allowing commercial entities to hold licenses in public safety radio services under any circumstances.

Spectrum designated by the FCC for services that protect the safety of life, health, or property must be under the control of those public safety services, which means that they must hold the relevant FC license. Commercial entities and public safety agencies have very different goals and incentives regarding spectrum use, channel loading, interference protection, long term planning, reliability, and coverage. Turning ownership and control of public safety spectrum over to commercial services would be no different than turning over ownership and control of law enforcement activities to a commercial entity. Granted, some state and local governments may choose to contract out certain services, but they remain ultimately responsible and have the ability to cancel the contract as necessary. In contrast, if licenses for scarce public safety radio spectrum fall into the hands of a commercial entity, the



agencies using that spectrum will find it nearly impossible to reclaim the spectrum should the commercial entity not live up its contractual obligations.

### **III. THE COMMISSION SHOULD ESTABLISH A “THIRD POOL” FOR “AUCTION-EXEMPT ENTITIES” NOT ELIGIBLE FOR LICENSES IN “PUBLIC RADIO SERVICES.”**

The Commission’s discussion of frequency pools, in paragraphs 39-42, represents one of the few instances in the NPRM where the Commission recognizes that there is not a complete overlap between “auction-exempt services” and “public safety radio services.” More specifically, the Commission seeks comments regarding the possible creation of a third pool for certain classes of auction-exempt licensees. For example, UTC, API, and AAR have proposed that the Commission establish a “Public Service Pool” to accommodate entities that “do not qualify for Public Safety Radio Pool spectrum, but are eligible to use the public safety radio services that the Balanced Budget Act exempted from the Commission’s auction authority.”<sup>3</sup> APCO believes that there is considerable merit to this “third pool” proposal, at least for frequency bands likely to be subject to auction. In many respects, the proposal reflects the definitions adopted after extended debate by the Public Safety Wireless Advisory Committee, which distinguished between Public Safety Services and Public Services as follows:<sup>4</sup>

**Public Safety:** The public’s right, exercised through Federal, State or Local government as prescribed by law, to protect and preserve life, property, and natural resources and to serve the public welfare.

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<sup>3</sup> NPRM at ¶41.

<sup>4</sup> Final Report of the Public Safety Wireless Advisory Committee, September 1996, at 45.

**Public Safety Services:** Those services rendered by or through Federal, State, or Local government entities in support of Public Safety duties.

**Public Safety Services Provider:** Governmental and public entities or those non-governmental, private organizations, which are properly authorized by the appropriate governmental authority whose primary mission is providing Public Safety services.

**Public Safety Support Provider:** Governmental and public entities or those non-governmental, private organizations which provide essential public services that are properly authorized by the appropriate governmental authority whose mission is to support Public Safety services. This support may be provided either directly to the public or in support of Public Safety services providers.

**Public Services:** Those services provided by non-Public Safety entities that furnish, maintain, and protect the nation's basic infrastructures which are required to promote the public's safety and welfare.

While the UTC, AAR, API proposal is worthy of consideration, APCO is less concerned with the specifics of a third pool than with the need to establish such a pool. Without a third pool, traditional public safety entities (state and local government police, fire, EMS etc.) could find themselves competing for spectrum with auction-exempt utilities, auto clubs, pipelines companies, railroads and other businesses. Despite the "safety" aspect of some of their operations, such businesses are nevertheless profit-motivated entities with very different operational requirements, obligations, and financial capabilities than state and local government public safety agencies.

State and local government public safety entities have unique requirements for extremely high levels of interference protection, ubiquitous coverage over areas of jurisdiction, system reliability, and system control for priority access during major emergencies and disasters. Most importantly, nearly all public safety communications directly or indirectly involve the imminent protection of life, health, and property. At the

same time, however, public safety agencies operate under the handicaps of limited resources, burdensome and time-consuming revenue raising and project approval procedures, and restricted staffing. Thus, while their spectrum requirements are very high, their ability to move quickly in a first-come first served environment (let alone an auction) is severely handicapped.

The Commission suggests in the NPRM that pools sometimes create inefficiencies. That may be true if the pools are too narrowly defined, as may have been the case “pre-refarming” when there were 20 separate private radio services below 470 MHz (though the inefficiencies were less than perceived due to the inter-category sharing rules). However, dividing all private wireless users into three pools, rather than two, would still leave more than adequate diversity within each pool to ensure efficient spectrum utilization. Furthermore, where there are inefficiencies, the Commission can and should grant waivers to permit “inter-pool” frequency sharing where that would serve the public interest.

#### **IV. THE COMMISSION MUST NOT UNDERMINE THE EXPRESS CONGRESSIONAL INTENT OF SECTION 337(c).**

Section 337(c) of the Communications Act, adopted as part of the Balanced Budget Act of 1997, requires the Commission to grant applications of qualified public safety entities for unused frequencies when five enumerated statutory standards are met. The provision applies to any vacant frequency allotted by the Commission and open for applications, regardless of whether the frequencies were intended for auction or licensable on a non-auction basis. The provision reflects the clear intent of Congress “that public safety agencies

that demonstrate a need for spectrum are not denied the use of unassigned frequencies that have lain fallow for an extended period of time.”<sup>5</sup>

In acting on the first application to be considered under new Section 337(c), the Commission as an interim measure provided some “additional guidance to public safety applicants regarding how a Section 337 application could be structured and what type of information could be included, so as to facilitate thorough and informed review.”<sup>6</sup> APCO urges the Commission to act promptly to complete this task so as to provide the public safety community with clear and explicit guidance as to the express standards the Commission will follow in acting upon specific applications. Such guidance is necessary not only to make the application process as easy as possible for public safety applicants, but also to ensure that applications under the statute are expeditiously processed by the Commission. While Section 337(c) was adopted almost two years ago and several applications under the statute have been filed, APCO notes that only one application (that of the South Bay Regional Public Communications Authority, which was pending at the time of the enactment of Section 337(c)) actually has been granted to date.<sup>7</sup> This is too long a time for public safety applicants to wait for existing vacant and available frequencies.

With respect to the substantive requirements of Section 337(c), the statute is clear on its face and does not require extensive further interpretation by the Commission. APCO

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<sup>5</sup> Balanced Budget Act of 1997, Conference Report to Accompany H.R. 2155, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., Report 105-217 (July 30, 1997), at 579.

<sup>6</sup> South Bay Regional Public Communications Authority, FCC 98-162, released July 30, 1998, ¶41. At the same time, the Commission noted its intent to implement the mandate of Section 337(c) in a future proceeding, which is now underway.

<sup>7</sup> APCO is aware of at least five pending Section 337(c) requests.

accordingly urges the Commission to adopt the following implementing standards, largely paraphrasing the language of the statute:

*(a) No other spectrum allocated to public safety service is immediately available to satisfy the requested public safety service use.*

Section 337(c) is premised on the recognition that separate public safety spectrum allocations will not solve the spectrum shortages faced by public safety agencies in many areas of the nation. The statute responds to this situation by allowing public safety applicants access to non-public safety frequencies where no allocated public safety service frequencies are immediately available to satisfy the applicants specific need. In cases where a public safety frequency allocation is not immediately available (or is for technical reasons not appropriate for the intended use), the requirements of this subsection are therefore met.

*(b) The requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations.*

This requirement is clear on its face, and does not require further explanation.

*(c) The use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made.*

As reflected in the Conference Report, this provision is intended to ensure that the use of a non-public safety frequency block does not unduly retard the overall “interoperability of public safety services” in the geographical area in which the public safety agency operates.<sup>8</sup> Interoperability among neighboring public safety agencies in the use of frequencies has been one of the Commission’s primary objectives, which APCO has consistently supported. This provision ensures that an important goal will not be thwarted

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<sup>8</sup> Balanced Budget Act of 1997, Conference Report to Accompany H.R. 2015, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., Report 105-217 (July 30, 1997), at 580.

through an overall pattern of piecemeal, inconsistent individual licensing decisions. It should be stressed, however, that within this overall objective, the Commission must accord individual public safety agencies a reasonable degree of discretion to implement Section 337(c) in a way deemed appropriate by the local agency to meet its immediate needs. So long as the overall interoperability objectives of the region are "not retarded" by a particular Section 337(c) frequency request, the application should be considered grantable under Section 337(c).

*(d) The unassigned frequency was allocated for its present use not less than two years prior to the date on which the [public safety] application is granted.*

As set forth in the Conference Report, the purpose of this fourth requirement is to "ensure that the Commission is given ample time to assign licenses for recently allocated spectrum before that spectrum can be assigned to public safety services."<sup>9</sup> However, once the two-year period has passed, the relevant spectrum is assumed to be "unassigned" and subject to Section 337(c) waiver. This is exactly the way this provision of the statute was interpreted in the one case decided to date.<sup>10</sup>

Notwithstanding this clear statutory scheme, the Commission questions whether it is in the public interest to allow public safety applications for frequencies that "while not yet licensed to another entity, have already been identified and designated by the Commission as frequencies to be licensed by auction." *NPRM* at ¶57. This is a specious question for the statute sets forth a clear standard which cannot be waived by the Commission. To the extent the two-year period from the allocation of the frequencies has not passed, no Section 337(c)

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<sup>9</sup> *Id.*

<sup>10</sup> South Bay Regional Public Communications Authority, FCC 98-162, released July 30, 1998, ¶38.

application can be granted in order to give the Commission ample time to entertain applications and conduct the auction. However, the two-year period has passed, the particular frequencies would be subject to the grant of Section 337(c) applications just as any other frequency allocation undertaken by the Commission. The statute contains no exclusion or exemption for frequencies identified and designated for auction.

*(e) Grant of the application is consistent with the public interest*

In addition to the four enumerated specific statutory criteria, Section 337(c) requires the Commission to find grant of the application is "consistent with the public interest." Given the specific and comprehensive nature of the first four statutory criteria, Congress obviously intended that compliance with these four criteria, standing alone, would establish a strong basis for granting the mandatory waiver. The consideration of other potentially countervailing factors under the fifth general public interest criteria should not be allowed to override a showing of compliance with the first four specific criteria, except in the most extraordinary of circumstances, where the reasons for the finding are clear, specific, supported by the factual record, and compelling. Furthermore, the discretion accorded to the Commission to consider other factors under the last criteria, of course, does not give the Commission the power merely to disagree with the Congress as to implementation of the first four criteria.

In addition, it is conceivable that while compliance with all four enumerated statutory criteria may not be clearly demonstrated in every respect, a strong overall public interest benefit could provide a countervailing factor in favor of a waiver. This is consistent with the long-standing Commission authority to grant discretionary waivers in the public interest.

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*See WAIT Radio v. FCC*, 418 F.2d 1253 (D.C. Cir. 1969); 47 C.F.R. §§1.3 and 90.151.

Thus, an applicant's failure to satisfy one or more of the four Section 337(c) criteria should not preclude consideration (and grant) of the Application under the Commission's existing discretionary authority.

## **V. OTHER ISSUES**

The Commission notes in paragraph 71, that the American Mobile Telecommunications Association, Inc. (AMTA) has proposed that Part 90 licensees, other than "Public Safety licensees" must convert to narrowband (12.5 kHz) technology by a specified date to retain their primary status. While this issue is not framed as a public safety matter, APCO notes that it has long supported firm (but reasonable) transition dates for public safety users to convert to 12.5 kHz technology. The current "spectrum refarming" approach of relying on equipment type-acceptance will simply take too long to complete.

However, should the Commission adopt a "primary/secondary" approach to encourage narrowband operation, it must take steps to prevent unintended harm to public safety, especially in situations where public safety and non-public safety users operate on adjacent channels (which could occur at "band edges" and at 470-512 MHz). Under no circumstances should a public safety licensee become secondary to a non-public safety licensee merely because it has not converted to narrowband technology. That could seriously undermine public safety communications operations.

APCO assumes that the Commission's preliminary proposal regarding a "band manager" applies only to non-public safety radio services, in which case APCO takes no position at this time. However, APCO would strongly oppose the band manager concept for public safety radio services, at least in the forms discussed in the NPRM.



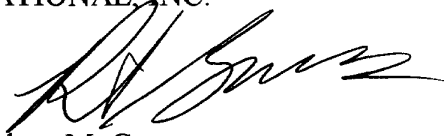
## CONCLUSION

APCO urges the Commission to adopt rules implementing Sections 309(j) and 337(c) of the Communications Act in a manner to protect and promote the needs of state and local government public safety agencies.

Respectfully submitted,

ASSOCIATION OF PUBLIC-SAFETY  
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Document #154375